

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF COMPLIANCE & INSPECTION**

**IN RE: David J. Decubellis, Jr.
Dale Fitzgerald et als**

FILE NO.: OCI-OWTS-14-101

NOTICE OF VIOLATION

A. Introduction

Pursuant to Sections 42-17.1-2(21) and 42-17.6-3 of the Rhode Island General Laws, as amended, (“R.I. Gen. Laws”) you are hereby notified that the Director of the Department of Environmental Management (the “Director” of “DEM”) has reasonable grounds to believe that the above-named parties (“Respondents”) have violated certain statutes and/or administrative regulations under DEM's jurisdiction.

B. Administrative History

On November 22, 2013, DEM issued a written final informal notice by certified mail to David DeCubellis and Dale Fitzgerald regarding the property that is the subject of this Notice of Violation (“NOV”). Previous informal notices were sent to each party on or about March 21, 2011 and April 26, 2012. The final informal notice advised the parties that, in accordance with the Rhode Island Cesspool Act, if the property has a cesspool and is in an area subject to the Act, the plumbing for the dwelling on the property must be connected to public sewers by 1 January 2014 or, if public sewers are not available, the parties must apply to DEM for a new onsite wastewater treatment system (“OWTS”) and install the system within 1 year of DEM’s approval. On December 3, 2013, the final informal notice was delivered. The parties failed to respond to or comply with the final informal notice. On April 29, 2014, DEM issued an Expedited Citation Notice (“ECN”) by certified mail to David DeCubellis, Dale Fitzgerald, Charles P. Kelley and Ann Kelley that included an administrative penalty of \$200. The ECN required the connection of the plumbing for the dwelling on the property to public sewers within 30 days or, if public sewers are not available, application to DEM for a new OWTS and installation of the system within 14 days of DEM’s approval. On May 12, 2014, the ECN was delivered. As of the date of the NOV, the parties have not responded to or complied with the ECN.

C. Facts

- (1) The property is located at 5 Pine Tree Point Road, Assessor’s Plat Y/1, Lot 230, in the Town of Narragansett, Rhode Island (the “Property”).
- (2) Respondents own the Property.
- (3) The Property includes a dwelling that was constructed in 1938.
- (4) DEM reviewed its records for the Property. The review revealed that no permit was issued by DEM for an OWTS for the Property.

- (5) DEM contacted the Town of Narragansett, Rhode Island to determine if the dwelling on the Property is connected to public sewers. DEM was informed that there is no record of a connection to public sewers.
- (6) Prior to 1968, cesspools were a common means of sewage disposal. Regulations enacted in Rhode Island in 1968 prohibited installation of cesspools.
- (7) Upon information and belief, DEM has determined that a cesspool is present on the Property and is located within 200 feet of the inland edge of a shoreline bordering a tidal water area (corresponding to the jurisdiction of the Rhode Island Coastal Resources Management Council).
- (8) As of the date of the NOV, Respondents have failed to apply to DEM to replace the cesspool.

D. Violation

Based on the foregoing facts, the Director has reasonable grounds to believe that you have violated the following statutes and/or regulations:

- (1) **R.I. Gen Laws Section 23-19.15-6(b)(3)** – prohibiting the use of cesspools and requiring by 1 January 2014 the proper abandonment of cesspools located within 200 feet of the inland edge of a shoreline bordering a tidal water area (corresponding to the jurisdiction of the Rhode Island Coastal Resources Management Council).
- (2) **Rhode Island Code of Regulations titled *Rules Establishing Minimum Standards Relating to Location, Design, Construction and Maintenance of Onsite Wastewater Treatment Systems (250-RICR-150-10-6)* (the “OWTS Regulations”), Rule 53.3.3 [recently amended to Part 6.57(C)(3)]** – requiring by 1 January 2014 the proper abandonment of cesspools located within 200 feet of the inland edge of a shoreline bordering a tidal water area (corresponding to the jurisdiction of the Rhode Island Coastal Resources Management Council).

E. Order

Based upon the violations alleged above and pursuant to R.I. Gen. Laws Section 42-17.1-2(21), you are hereby ORDERED to:

- (1) **IMMEDIATELY** cease use of the cesspool.
- (2) **Within 30 days of receipt of the NOV**, abandon the cesspool in accordance with Part 6.56 of the OWTS Regulations and submit documentation to DEM’s Office of Compliance and Inspection (“OC&I”) to demonstrate compliance **OR** retain a licensed OWTS designer and have the licensed OWTS designer submit a formal application and plan to DEM to replace the cesspool in accordance with the OWTS Regulations (the “Application”). The list of licensed OWTS designers can be obtained by contacting Deb Knauss at 222-4700, Ext. 7612 or from DEM’s

web page at:

www.dem.ri.gov/programs/benviron/water/licenses/isds/pdfs/deslist.pdf.

- (3) The Application shall be subject to DEM's review and approval. Upon review, DEM shall provide written notification to you either granting formal approval or stating the deficiencies therein. Within 7 days (unless a longer time is specified) of receiving a notification of deficiencies in the Application, you must submit to DEM a modified proposal or additional information necessary to correct the deficiencies.
- (4) **Within 120 days of DEM's approval of the Application**, complete all work in accordance with the approval as evidenced by the issuance of a Certificate of Conformance by DEM.

F. Penalty

- (1) Pursuant to R.I. Gen. Laws Section 42-17.6-2, the following administrative penalty, as more specifically described in the attached penalty summary and worksheets, is hereby ASSESSED, jointly and severally, against each named respondent:

\$5,000

- (2) The proposed administrative penalty is calculated pursuant to the Rhode Island Code of Regulations titled *Rules and Regulations for Assessment of Administrative Penalties (250-RICR-130-00-1)* and must be paid to DEM within 30 days of your receipt of the NOV. Payment shall be in the form of a certified check, cashiers check or money order made payable to the "General Treasury - Water & Air Protection Program Account," and shall be forwarded to DEM's Office of Compliance and Inspection, 235 Promenade Street, Suite 220, Providence, Rhode Island 02908-5767.
- (3) Penalties assessed against Respondents in the NOV are penalties payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.
- (4) If any violation alleged herein shall continue, then each day during which the violation occurs or continues shall constitute a separate offense and the penalties and/or costs for that violation shall continue to accrue in the manner set forth in the attached penalty summary and worksheets. The accrual of additional penalties and costs shall be suspended if DEM determines that reasonable efforts have been made to comply promptly with the NOV.

G. Right to Administrative Hearing

- (1) Pursuant to R.I. Gen. Laws Chapters 42-17.1, 42-17.6, 42-17.7 and 42-35, each named respondent is entitled to request a hearing before DEM's Administrative Adjudication Division regarding the allegations, orders and/or penalties set forth in Sections B through F above. All requests for hearing MUST:
 - (a) Be in writing. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.6-4(b);
 - (b) Be **RECEIVED** by DEM's Administrative Adjudication Division, at the following address, within 20 days of your receipt of the NOV. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and 42-17.7-9:

Administrative Clerk
DEM - Administrative Adjudication Division
235 Promenade Street, Room 350
Providence, RI 02908-5767

- (c) Indicate whether you deny the alleged violations and/or whether you believe that the administrative penalty is excessive. See R.I. Gen. Laws Section 42-17.6-4(b); **AND**
 - (d) State clearly and concisely the specific issues which are in dispute, the facts in support thereof and the relief sought or involved, if any. See Part 1.7(B) of the Rhode Island Code of Regulations titled *Rules and Regulations for the Administrative Adjudication Division (250-RICR-10-00-1)*.
- (2) A copy of each request for hearing must also be forwarded to:

Tricia Quest, Esq.
DEM - Office of Legal Services
235 Promenade Street, 4TH Floor
Providence, RI 02908-5767

- (3) Each named respondent has the right to be represented by legal counsel at all administrative proceedings relating to this matter.
- (4) Each respondent must file a separate and timely request for an administrative hearing before DEM's Administrative Adjudication Division as to each violation alleged in the written NOV. If any respondent fails to request a hearing in the above-described time or manner regarding any violation set forth herein, then the NOV shall automatically become a Final Compliance Order enforceable in Superior Court as to that respondent and/or violation and any associated administrative penalty proposed in the NOV shall be final as to that respondent. See R.I. Gen. Laws Sections 42-17.1-2(21)(i) and (vi) and 42-17.6-4(b) and (c).

- (5) Failure to comply with the NOV may subject each respondent to additional civil and/or criminal penalties.
- (6) An original signed copy of the NOV is being forwarded to the Town of Narragansett, Rhode Island wherein the Property is located to be recorded in the Office of Land Evidence Records pursuant to R.I. Gen. Laws Chapter 34-13 and Section 42-17.1-2(13), as amended.
- (7) The NOV does not preclude DEM from taking any additional enforcement action nor does it preclude any other local, state, or federal governmental entities from initiating enforcement actions based on the acts or omissions described herein.

If you have any legal questions, you may contact (or if you are represented by an attorney, please have your attorney contact) Tricia Quest of DEM's Office of Legal Services at (401) 222-6607. All other inquiries should be directed to Stephen Tyrrell of DEM's Office of Compliance and Inspection at (401) 222-1360 ext. 7406.

Please be advised that any such inquiries do not postpone, eliminate, or otherwise extend the need for a timely submittal of a written request for a hearing, as described in Section G above.

FOR THE DIRECTOR

By: _____
David E. Chopy, Administrator
DEM Office of Compliance and Inspection

Dated: _____

CERTIFICATION

I hereby certify that on the _____ day of _____
the within Notice of Violation was forwarded to:

David J. Decubellis, Jr.
Dale Fitzgerald et als
c/o Charles Kelley
P.O. Box 273
Wakefield, RI 02880

by Certified Mail.



ADMINISTRATIVE PENALTY SUMMARY

Program: OFFICE OF COMPLIANCE AND INSPECTION, OWTS
 File No.: OCI-OWTS-14-101
 Respondents: David J. Decubellis, Jr., Dale Fitzgerald et als

GRAVITY OF VIOLATION					
SEE ATTACHED "PENALTY MATRIX WORKSHEETS."					
VIOLATION No. & CITATION	APPLICATION OF MATRIX		PENALTY CALCULATION		AMOUNT
	Type	Deviation	Penalty from Matrix	Number or Duration of Violations	
D (1) and (2) – Failure to Abandon Cesspool	Type I <i>(\$1,000 Max. Penalty) *</i>	Major	\$1,000	5 years	\$5,000
<i>SUB-TOTAL</i>					\$5,000

*Maximum Penalties represent the maximum penalty amounts per day, per violation.

ECONOMIC BENEFIT FROM NONCOMPLIANCE

COSTS OF COMPLIANCE, EQUIPMENT, O&M, STUDIES OR OTHER DELAYED OR AVOIDED COSTS, INCLUDING INTEREST AND/OR ANY COMPETITIVE ADVANTAGE DERIVED OVER ENTITIES THAT COMPLY. NOTE: ECONOMIC BENEFIT MUST BE INCLUDED IN THE PENALTY UNLESS:

- THERE IS NO IDENTIFIABLE BENEFIT FROM NONCOMPLIANCE; OR
- THE AMOUNT OF ECONOMIC BENEFIT CAN NOT BE QUANTIFIED.

A review of the record in this matter has revealed that Respondents have either enjoyed no identifiable benefit from the noncompliance alleged in this enforcement action or that the amount of economic benefit that may have resulted cannot be quantified.

COST RECOVERY

ADDITIONAL OR EXTRAORDINARY COSTS INCURRED BY THE DIRECTOR DURING THE INVESTIGATION, ENFORCEMENT AND RESOLUTION OF AN ENFORCEMENT ACTION (EXCLUDING NON-OVERTIME PERSONNEL COSTS), FOR WHICH THE STATE IS NOT OTHERWISE REIMBURSED.

A review of the record in this matter has revealed that DEM has not incurred any additional or extraordinary costs during the investigation, enforcement and resolution of this enforcement action (excluding non-overtime personnel costs), for which the State is not otherwise reimbursed.

TOTAL PENALTY PROPOSED UNDER PENALTY REGULATIONS = \$5,000

PENALTY MATRIX WORKSHEET

CITATION: Failure to Abandon Cesspool

VIOLATION NO.: D (1) and (2)

TYPE		
<u> X </u> TYPE I DIRECTLY related to protecting health, safety, welfare or environment.	___ TYPE II INDIRECTLY related to protecting health, safety, welfare or environment.	___ TYPE III INCIDENTAL to protecting health, safety, welfare or environment.
DEVIATION FROM THE STANDARD THE DEGREE TO WHICH A VIOLATION IS OUT OF COMPLIANCE WITH THE REQUIREMENT VIOLATED.		
<p>FACTORS CONSIDERED:</p> <p>Taken from Part 1.10(A)(1)(b) of the Rhode Island Code of Regulations titled <i>Rules and Regulations for Assessment of Administrative Penalties (250-RICR-130-00-1)</i></p> <ol style="list-style-type: none"> (1) The extent to which the act or failure to act was out of compliance: The Rhode Island Cesspool Phase Out Act requires that cesspools located within 200 feet of the inland edge of a shoreline bordering a tidal water area (corresponding to the jurisdiction of the Rhode Island Coastal Resources Management Council) be abandoned. Respondents failed to remove and properly abandon the cesspool on the Property. (2) Environmental conditions: The cesspool is in a densely populated neighborhood and within 200 feet of the inland edge of a shoreline bordering a tidal water area (corresponding to the jurisdiction of the Rhode Island Coastal Resources Management Council). (3) Amount of the pollutant: Considered, but not utilized for this calculation. (4) Toxicity or nature of the pollutant: Wastewater contains many kinds of bacteria, viruses, and parasites that can cause serious or fatal diseases in both humans and animals and contains pollutants that can cause groundwater and surface water impacts. (5) Duration of the violation: 5 years, 9 months – the cesspool was required to be removed by January 1, 2014. (6) Areal extent of the violation: Considered, but not utilized for this calculation. (7) Whether the person took reasonable and appropriate steps to prevent and/or mitigate the noncompliance: Respondents failed to take reasonable and appropriate steps to prevent and/or mitigate the noncompliance despite being advised by DEM in notices issued on or about March 21, 2011, on or about April 26, 2012, on November 22, 2013, and on April 29, 2014 that the cesspool needed to be removed. (8) Whether the person has previously failed to comply with any regulations, order, statute, license, permit or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce: Considered, but not utilized for this calculation. (9) The degree of willfulness or negligence, including but not limited to, how much control the violator had over the occurrence of the violation and whether the violation was foreseeable: Respondents had full control over the violation. The violation was foreseeable. (10) Any other factor(s) that may be relevant in determining the amount of a penalty: The notice issued on April 29, 2014 stated the penalty could be up to \$1,000 per day. 		
<u> X </u> MAJOR	MODERATE	MINOR

Penalty Matrix where the applicable statute provides for a civil penalty up to \$1,000		TYPE I	TYPE II	TYPE III
DEVIATION FROM STANDARD	MAJOR	\$800 to \$1,000 \$1,000	\$600 to \$800	\$400 to \$600
	MODERATE	\$600 to \$800	\$400 to \$600	\$200 to \$400
	MINOR	\$400 to \$600	\$200 to \$400	\$100 to \$200